

No. 15249

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. S. JOHNSON COMPANY,

Plaintiff-Appellant,

vs.

MERLE W. STROMBERG, dba CALIFORNIA BATCHING
EQUIPMENT Co., DOE I, DOE II, and DOE III,

Defendant-Appellee.

PETITION FOR REHEARING.

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TOPICAL INDEX

PAGE

Argument 3

I.

First question 3

II.

Second question 10

III.

Third question 15

Conclusion 20

TABLE OF AUTHORITIES CITED

CASES	PAGE
Acme Flexible Clasp Co. v. Cary Mfg. Co., 96 Fed. 344, aff'd 101 Fed. 269.....	10
Baltimore & O. R. Co. v. O'Neill, 211 F. 2d 190.....	19
Bianchi v. Barili, 168 F. 2d 793, 78 U. S. P. Q. 5.....	3
Charles Peckat Mfg. Co. v. Jacobs, 178 F. 2d 794.....	9
Gillman v. Stern, 114 F. 2d 28.....	13
Gordon v. Robinson, 210 F. 2d 192.....	19
John Irving Shoe Co. v. Dugan, 93 F. 2d 711.....	17
Kamm v. Rees, 177 Fed. 14.....	19
Korte v. New York, N. H. & H. R. Co., 191 F. 2d 86.....	18, 19
Motor Improvements Inc., et al. v. General Motors Corp., et al., 49 F. 2d 543, 9 U. S. P. Q. 360.....	3
National Labor Relations Board v. Sharples Chemicals, 209 F. 2d 645	17
Palmer v. Hoffman, 318 U. S. 109.....	18
The Philadelphia and Trenton Railroad Co. v. Stimpson, 39 U. S. 459.....	13
Topliff v. Topliff and Another, 145 U. S. 156.....	3
United States v. Smart, 87 F. 2d 3.....	17

SENATE REPORT

Senate Report No. 1965, 74th Cong., 2d Sess., pp. 1-2.....	18
--	----

STATUTES

Revised Statutes, Sec. 4920.....	10
United States Code, Title 28, Sec. 1732(a).....	2, 17, 18, 19, 20
United States Code, Title 35, Sec. 282(4).....	2, 10, 11, 12, 14, 15

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PETITION FOR REHEARING.

*To the Honorable Judges Albert Lee Stephens, Richard
H. Chambers, and Stanley N. Barnes of the United
States Court of Appeals for the Ninth Circuit.*

Comes now the appellant and petitions this Honorable
Court for a rehearing of this appeal, upon the grounds
hereinafter set forth.

This petition is submitted for the principal purpose of
asking the Court to reconsider points of law controlling
here. Equally important, this petition asks the court to
reconsider rulings of law which have an effect far beyond
the confines of this case, and, indeed, beyond the confines
of the Patent Law.

**Questions On Which Reconsideration
Is Sought.**

This petition requests reconsideration of the following
questions of law:

1. DOES A PURPORTED PRIOR USE INVALIDATE A PATENT
CLAIM, WHERE THERE IS NO SWORN TESTIMONY OR

DOCUMENTARY EVIDENCE TO SUPPORT THE SPECIFIC COMBINATION OF ELEMENTS CLAIMED, AND NO EVIDENCE THAT THE FUNCTION OF THE INVENTION WAS PERFORMED?

It is our position that the rule of the barbed wire case (143 U. S. 275) should be followed. Such rule requires proof beyond a reasonable doubt as to the invention claimed, not merely pieces thereof.

2. DOES 35 U. S. C. 282 (4) PERMIT FOR INVALIDATING A PATENT THE INTRODUCTION OF PROOF ON AN UNNOTICED PRIOR USE BY WITNESSES WHOSE IDENTITY IS INTENTIONALLY WITHHELD UNTIL THEY ARE PUT ON THE STAND, WHERE THE TRIAL COURT SETS NO TERMS ON WHICH SUCH PROOF CAN BE MADE AND ONLY AFTER TRIAL GRANTS PLAINTIFF AN OPPORTUNITY TO INVESTIGATE?

Our position is that the ruling of this Court reads out of the Patent Laws, Section 282 (4) of the Title 35 U. S. C. The only inducement left for a defendant in a patent case to observe that section of the statutes is that this Court may in the future change its interpretation.

3. ARE SELECTED DOCUMENTS FOUND IN THE FILES OF A THIRD PARTY ADMISSIBLE UNDER 28 U. S. C. 1732 (a) TO PROVE THAT A SPECIFIC APPARATUS WAS PUBLICLY SOLD AND USED, WHERE THE DOCUMENTS WERE PURPORTEDLY MADE BEFORE THE APPARATUS WAS EVEN BUILT, AND ARE IDENTIFIED ONLY BY TESTIMONY OF REGULAR BUSINESS PRACTICE AS IT EXISTED NINE YEARS LATER?

Our position is that Section 1732(a) of Title 28 U. S. C. makes documents, commonly classified as business records, admissible to prove a particular act or transaction only if they are a recording of the art sought to be proved, and are shown to have been *made* in the regular course of business and *at the time of making* it was the regular course of business to make them.

ARGUMENT.

I.

First Question.

A Prior Use to Invalidate Must Teach
the Complete Invention.

It is our position that the following decisions should control the facts of this case:

“It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.” *Topliff v. Topliff and Another*, 145 U. S. 156, 161. (Quoted by this Court with approval in *Bianchi v. Barili*, 168 F. 2d 793 (78 U. S. P. Q. 5).

To the same effect:

“A prior use which requires modification to perform the function of the patent attacked is no anticipation. *Babcock & Wilcox Co. v. Springfield Boiler Co.*, 16 F. 2d 964, 969 (C. C. A.-2).” *Motor Improvements Inc. et al v. General Motors Corp., et al* 49 F. 2d 543 (C. C. A.-6) (9 U. S. P. Q. 360).

On the facts of this case, the so-called “Alabama Plant” did not embody the invention of the patent in suit. In its opinion, the Court gave no indication that it had made an independent interpretation of the claimed invention in relation to the alleged prior use.

The Inventive Contribution of Johnson Is the
Commingling of Free Falling Concrete Making
Material at the Discharge of the Weigh
Batcher and During Free Fall.

Throughout the patent in suit the words commingling, pre-mixing, and intermingling are used synonymously to denote the commingling of the cement and aggregates which occurs *at the weigh hopper discharges and during the free fall* of such materials from the weigh hoppers to the collecting cone. The advantages of this are set forth in the Court's opinion. (Op. p. 2.)

The concept of commingling of the aggregates and cement at the batcher discharge is not an after thought, but on the contrary, the patentee states in the introductory paragraphs of the patent (p. 1, col. 1, lines 42-49):

"In other words, practically speaking, the cement hopper and the main hopper for the other aggregates to be *commingled* with the cement are *separately suspended* from the respective scale means employed therefor and are *independently movable* in the *independent weighing* operations to be performed for the contents of each hopper."

And as a result:

"Under the use of the invention, a certain amount of improvement by *pre-mixing* or *intermingling* of the materials is effected after they are batched and *before they ever reach the mixing apparatus proper* in which the *final* mixing operation is to be performed." (P. 1, col. 2, lines 37-43.)

The described physical structure of the drawings to accomplish this is recited as follows:

"When the discharge gates 22 and 23 are opened it will be apparent that the cement being disposed so as

to discharge downwardly between and *into* the other aggregates of sand, fine rock, and coarse rock, will be *intermingled* with and fill the 'voids' of the latter as the various aggregates pour out of the discharge for the hopper 7, adjacent to the gate 23. This *commingled* action involves in part the principle of the gravitational mixing method previously referred to herein, and consequently some *pre-mixing* and shrinkage of the over-all batch, and effects other practical advantages in the employment of the apparatus under conditions of service." (P. 3, col. 1, lines 27-41.)

The patentee carries the concept of commingling a step further in the provision of a concentric water shroud.

"The *intermixing of the water and dry aggregates*, where brought together, is highly efficient because the precipitated water enters the flowing shaft of dry aggregates *from all sides thereof* to penetrate and commingle with said dry aggregates." (P. 3, col. 2, lines 42-47.)

Defendant Has Not Contended That the Record Supports Its Claim That the Invention Was Present In the "Alabama Street Plant."

Defendant at most asserts that its witnesses testified that the "Alabama Plant" had:

1. A cement hopper within an aggregate hopper.
2. Each suspended from separate scales.
3. The hopper discharges were concentrically disposed.
4. The hopper discharges were one above the other.

Defendant has made no assertion that the testimony of Murasko or Cornett adds any more. (Deft. Br. pp. 7-8.)

Indeed, Vornett's testimony negatives any claim that the inventions of the patent in suit were in the "Alabama Plant." Cornett testified:

"Q. Well, what I want to learn is whether or not the cement falling out from your cement hopper fell into the streams of aggregates falling from the aggregate hopper? A. No, it did not." [Tr. p. 535.]

Again, at pages 539 and 540:

"Q. Yes, this is where they first strike. In your construction, did they strike up here at the top? Did they intermingle or mix right here at the gate? A. Not until the chute.

Q. Not until they hit way down here? A. Yes.

Q. So, in the construction of your plant, the actual mixing of the cement and the aggregate took place at a point I am going to mark X on this drawing I have just made, is that correct? A. That's right."

The point "X" is on Plaintiff's Exhibit 20 where it appears down in the collecting cone and not at the discharge of the batcher.

The witness Murasko said not one word about commingling at the discharge or during the free fall, or at any other place.

The Record Is Devoid of Fact Testimony That the Hoppers of the Alabama Street Plant Were Independently Movable.

Nor is there any testimony by the only two fact witnesses produced by defendant that in the Alabama plant, "each hopper may move *independently* relatively to the other and the materials contained therein" (Claim 1 in suit), or that there were "means whereby * * *

cement * * * and * * * aggregates * * * may be accurately measured *independently*.” (Claim 5.) The only factual testimony here is that the “Alabama Plant” had separate hoppers one within another and separate scales for each. Such testimony as there is on the topic, is again, contrary to a holding of anticipation. It was Cornett, defendant’s witness, who testified the cement hopper was tied to the aggregate hopper by springs. [Tr. pp. 594-596.]

Defendant recognized the failure of his prior use defense on the testimony of Cornett. To avoid it, defendant’s attorney asserts, without the benefit of oath or qualification, that the testimony of Cornett as to the springs makes no difference as a matter of fact. (Deft. Br. p. 10.) If it be a fact, let defendant prove it in accordance with the principles of judicial procedure. Patent cases are not such unique litigation as to permit findings without support of the record.

**Claim 5 Must Be Considered
Separately From Claim 1.**

It is respectfully pointed out that the Court, in its opinion, made no mention of claim 5 except to quote it in a footnote.

It does not require citation that claims are to be separately considered, and that the validity of claim 1 has nothing to do with the validity of claim 5.

Claim 5 spells out, *in great detail*:

(a) *Commingling* of the cement and aggregates *at the hopper discharges* and *during the free fall*, and

(b) The *water ring* directing water *at an angle* into the falling shaft of cement and aggregates.

Relative to (a), the absence of any commingling during the free fall at the Alabama Street Plant was established by Defendant's witness, as pointed out previously herein. It was testified by Cornett that the cement and aggregates did not come together until the collecting cone or chute.

Relative to (b), Defendant has not merely appropriated a water ring, but the *exact angle-type* water ring described in the patent and *specifically* spelled out in claim 5. As will next be demonstrated, this feature of claim 5 was also not anticipated.

In view of the above, how can the findings relative to claim 5 be regarded as anything other than obviously erroneous?

**The Record Is Devoid of Any Teaching of the
Commingling of Dry Materials and
Water During Free Fall.**

Defendant's record negatives any suggestion, teaching or idea of the "water ring" of Johnson's invention. The "Alabama Plant" didn't have it. The witness Murasko testified:

"The Court: How was the water inserted into the mix? Just one stream?

The Witness: One steady stream.

The Court: Just one steady stream?

The Witness: That's right. The weighed water would discharge." [Tr. p. 492.]

Again, from Cornett's testimony [Tr. p. 591]:

"Q. In other words, you simply dumped a stream of water into the hopper L down at the bottom, just a single stream of water? A. That's right.

Q. You didn't try to encircle the aggregate stream with the water? A. No.

Q. Just dumped it right in? A. No. The water went into the mixer proper."

There is not a scintilla of evidence in the record that the water ring is not an inventive and valuable contribution to the art. On the contrary, its value was recognized by the Patent Office, and proved by plaintiff's witness. [Tr. p. 110.]

To find a combination is obvious, both the Patent Law and common sense demand at least a spark of a suggestion by another. Here the scintilla is missing.

Defendant Himself Tacitly Concedes That the Alabama Street Plant Does Not Anticipate Claims 1 and 5.

Defendant also recognizes (p. 15, his brief) that if the claims are to be interpreted "as limited to a device wherein the so-called premixing or commingling occurs," there would be no infringement by a structure in which the premixing or commingling was not present. Since "that which does not infringe, if earlier, would not anticipate" (*Charles Peckat Mfg. Co. v. Jacobs* (7th Cir., 1949), 178 F. 2d 794), there can be no anticipation by the Alabama Street plant.

The invention here is not broadly the placing of a hopper within a hopper. There is no question about what Johnson was trying to do and teach. He wanted to provide a weigh batcher with a new and better type of discharging action. He certainly did not just want to make a "hopper within a hopper" but contributed to the concrete industry a new form of batching apparatus having a discharging action never before achieved. Claim 1,

properly construed, is limited to the invention, Johnson's contribution. Claim 5, without argument, is so limited.

The Alabama Street plant simply does not meet the time honored requirements for anticipation as stated in *Acme Flexible Clasp Co. v. Cary Mfg. Co.*, 96 Fed. 344 (aff'd by C. C. A. 2 in 101 Fed. 269).

“Such alleged anticipation, whether by foreign printed publication or physical presence in this country, must so embody the complete patented article, or be so substantially like it, that a specification could be based thereon.”

We request the Court to reconsider its ruling that a prior use is an anticipation where the record is devoid of evidence that it operates in the same manner and has all of the elements or equivalents of the claimed invention.

II.

Second Question.

The Holding of This Court Vitiates the Provision of Section 282 (4), Title 35, U. S. C.

It is seldom that the decision of a single patent case has implications much beyond its own special set of facts. In the present case however, this Court has laid down broad rules of procedure which reach well beyond the bounds of this case.

The holding of the Court on the matter of notice under Section 282(4), Title 35, U. S. C. has given a carte blanche to litigants to disregard the requirements of that section. This in spite of the fact that Revised Statute 4920 was modified when codified in Section 282(4), Title 35, U. S. C. to insure a fairer trial to the patentee. It was the intent of Congress to require 30 day notice not

only of the prior art documents, uses, and sales offered as anticipations, but those offered to show state of the art as well.

**Defendant Here Schemed to Deny
Plaintiff a Fair Trial.**

Contrary to the intent of the statute, a more carefully devised scheme by a defendant to deceive and conceal could hardly be imagined than that practiced by the defendant in this case. Defendant knew of the evidence to be offered during the week preceding trial, but kept it secret. Defendant not wanting to give plaintiff a chance to ask for a postponement, held back until after trial had started, until after plaintiff's first witness had testified. Then and only then did defendant announce it had a prior use, not previously noticed. And even then, defendant gave no notice of the names and addresses, as required by statute, but preferred to hide behind a vague representation that he had in mind some plant in San Francisco. [Tr. p. 157.]

On the last day of the trial the unnamed witnesses appeared. Even then they were not the mysterious owner and operator from San Francisco which defendant had represented to the Court they would be, but a couple of construction workers, one from Los Angeles, and the president of Bodinson Mfg. Co., Inc. [Tr. pp. 472-597.]

Moreover, the defendant had not been diligent and didn't even claim to have been diligent.

If that is the type of conduct by a litigant which is to be condoned, Section 282(4) of Title 35, U. S. C. is meaningless.

Plaintiffs were trapped by defendant's stratagems into continuing the trial, for the trial court clearly indicated he would not be a party to any delay. [Tr. p. 166.]

Plaintiff had to proceed to cross-examination of witnesses it had not seen, on drawings it had not time to study, and about subject matter carefully concealed from its counsel. Defendant skillfully had all three of its unnamed witnesses and its secret drawings appear on the last day of trial to insure plaintiff would not have even one evening to prepare and study the offered proofs.

The Belated Grace Period Is Ineffective.

Defendant, having artfully maneuvered his secret witnesses and proofs before the Court, planted the seeds which could not be stamped out. It does not require text books citations for the proposition that effective cross-examination cannot be carried out unless the cross-examiner is informed of the matter in question.

In patent cases, the prior use witnesses are not just mere witnesses testifying to an occurrence of which both parties are familiar. Prior use witnesses testify concerning events apart from any matter the patentee can be expected to know. To force any party to trial under such circumstances does not contribute to the ascertainment of truth.

It is indeed, for this reason that the Patent Laws, Section 282(4), provides for notice before trial, not for an interruption of trial. We agree with the Court that a primary function of the judicial system is to ascertain the truth, but we submit it cannot be ascertained in the manner approved thus far in this case.

The courts have consistently recognized that the notice requirement is no mere technicality whereas reliance on

a non-informing third party prior use is. (*Gillman v. Stern*, 114 F. 2d 28, 31 (C. A. 2, 1940).) Defendant in his 28 years in the business [Tr. p. 161] made no claim of learning anything from the "*Alabama Plant*." The requirement for notice has been strictly construed, regardless of the consequences to the party failing to give notice. (*The Philadelphia and Trenton Railroad Co. v. Stimpson*, 39 U. S. 448, 459.)

Nowhere has plaintiff been able to find that when rephrasing the statute to also require notice of state of the art defenses Congress changed its purpose. The rule exists to prevent the admission of unnoticed testimony. It is a *non sequitur* to say that the same rule has exceptions for "aiding the ascertainment of truth."

In the present case, the grace period after trial to bring in new evidence was an idle gesture. The witnesses had the chance to reconsider their testimony, to revise their stories before being recalled. That does not aid the ascertainment of truth.

**The Exception Contemplated Cannot Be
Such as to Vitate the Rule.**

We do not contend that the last sentence of the section does not appear to provide for some exception. We do contend, however, that Congress never intended the exceptions to be so broad as to vitiate the very purpose of the rule.

Without the exception, the defendant would forever be barred from presenting the unnoticed proofs. The exception, at the least, must have been intended to place the patentee in no less favorable position than he would have been, if he had had the required notice. Plaintiff here obviously was not placed in such favorable position.

A rule, which for more than a hundred years has required 30 days notice before the trial, has now been judicially modified to a rule which only requires a 30 day investigation period after the trial. If Congress had intended this, certainly there would have been no point in keeping the rule.

**The Trial Court Failed to Specify Any Terms
on Which Proof Could Be Made.**

In spite of the clear injunction of Section 282(4), Title 35, U. S. C. which states:

“In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires.”

here the proof without notice went into the record without any terms whatsoever having been specified by the trial court.

We submit that if this Court is to permit unbridled disregard of the requirement for notice, that, at least, it require the trial court to state the “terms” for admissibility prior to the “proof” being made. To that extent, plaintiff should be entitled to fair play.

**The Ruling of the Court Invites Disruption of
Orderly Court Procedures.**

In its opinion, the Court recognizes that the purpose of the notice requirement is to prevent surprise at the trial, to enable both sides to better understand their adversary's case; and to cut down on “expensive delays,” or to prevent “a loss of a cause.”

The ruling of the Court is clearly opposed to those purposes. It has invited, and sanctioned, the two stage patent case. No longer can a party to a patent case

expect a speedy dispatch of the case. There are many doctrines which may affect the ascertainment of truth, but are salutary as necessary to orderly proceedings. Such doctrines as *res adjudicata*, and the stringent requirements for new trial are examples (our reply brief, pp. 11 and 12). For this Honorable Court to leave the questions up to the uncontrolled discretion of the trial court operates, as above stated, to induce defendants in patent actions to ignore the thirty-day notice rule. Stated otherwise, the instant case is a precedent that even though a defendant is not diligent, it is all right to bring in unnoticed testimony even after commencement of trial, which has the effect of removing the incentive for defendants to be anything other than dilatory.

We submit the Court reconsider its ruling on Section 282(4), Title 35, U. S. C. because it rewards disregard of the statute, encourages irregular and inefficient trial procedures and prejudices the diligent party.

III.

Third Question.

**The Rule of This Court Under 28 U. S. C. 1732(a) Condones Admissibility of Documents Far Beyond the Provisions of the Statute and Accepted Doctrines.
The Ruling of the Court.**

This Court has upheld the admissibility of certain drawings and shop orders [Deft. Exs. A and F-P] for the purpose of showing the construction details of apparatus purportedly made by the Bodinson Mfg. Co., Inc.

The Court's ruling means:

1. Documents are admissible to prove the existence and nature of an act or event which happened subsequent to the making of the documents.

2. Documents found in the files of a third party corporation are admissible upon proof of the regular business practices existing many years subsequent to the making of the documents.

**Drawings and Shop Orders Are Inadmissible to
Prove the Existence and Natures of Apparatus
Subsequently Sold and Used.**

The rule of admissibility of shop books, regularly kept business entries and records is premised on the inherent reliability and trustworthy character of such documents.

In the case at hand, experience and custom point to the unreliability of the documents here for the purpose offered. Common experience in industry clearly shows many differences between the draftsman's representation or design and the final product. This is particularly apparent here where the drawings and shop orders do not indicate what was sold and delivered. Indeed, they do not show anything listed on them was even made or completed.

Yet the drawings and shop orders are accepted by this Court to prove the physical existence and nature of a specific apparatus (Op. p. 11), in spite of the fact that Bodinson testified he had nothing to do with the Exhibits at the time they were purportedly made and that at no later date did he compare them with the Alabama Street plant. [Tr. pp. 579, 580.]

Even oral testimony of the maker of the drawings and shop orders would not be admissible to show a use of an apparatus, unless that person knew the apparatus

was made and how it was made. There is no such knowledge here.

Lacking any intrinsic reliability, or any testimony to authenticate them, we ask the Court to reconsider its holding that these documents are admissible to show the construction of the apparatus inside the "Alabama Plant."

The Documents Are Inadmissible for Failure to Meet the Conditions of Section 1732(a).

The Court's interpretation of the requirements of Section 1732(a) effectively opens the door to admissibility of documents which have none of the characteristics of reliability and trustworthiness, on which the statute is premised.

This record establishes the nature of entries made in the regular course of business of Bodinson Mfg. Co., Inc., only as early as 1940, some nine years subsequent to the dates appearing on the drawings. There was no showing of the regular business practice of either the company, or the general community in 1931, if even that would be sufficient.

The only proofs touching authenticity of these documents is that they were found in files of the corporation. Insufficiency of such proofs has been upheld by the First Circuit in *John Irving Shoe Co. v. Dugan*, 93 F. 2d 711 (1st Cir., 1937), for bills of materials; *United States v. Smart*, 87 F. 2d 3 (5th Cir., 1936), for medical reports; *National Labor Relations Board v. Sharples Chemicals*, 209 F. 2d 645, 653 (6th Cir., 1954).

In *Palmer v. Hoffman*, 318 U. S. 109, Mr. Justice Douglas, speaking for a unanimous court, referred to the report of the Senate Judiciary Committee on the bill which matured into Section 1732. That report identifies the intended enlargement of the old common-law rule to be enacted by the statutory provision:

“The old common-law rule requires that every book entry be identified by the person making it. This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when entries are made by machine.” (S. Rep. No. 1965, 74th Cong., 2d Sess., pp. 1, 2.)

Section 1732 was not intended to make admissible the entire contents of a company's files, on mere proof of a subsequent business practice, but only to relieve the offeror of the burden of bringing in the person who actually made the entry.

In support of the proposition that no proof of the regular business practice at the time the documents presumably made is required, the Court referred to *Korte v. New York, N. H. & H. R. Co.*, 191 F. 2d 86 (2nd Cir., 1951). In that case, the doctor's reports in question came not from some forgotten, unauthenticated source, but from the opposing party's own files. No one had any doubt as to the authenticity of the reports, that they had been received by defendant, stamped by its agent, concerned a particular individual, and recorded an existing act or occurrence. Not one of these facts is present in this case.

Even the decision in the *Korte* case is recognized as at variance with the stricter rulings by other Circuits. (*Gordon v. Robinson*, 210 F. 2d 192, 197, 198 (3rd Cir., 1954); *Baltimore & O. R. Co. v. O'Neill*, 211 F. 2d 190, 195 (6th Cir., 1954).)

The drawings and shop orders may be sufficient to show an intent to do something, but are not admissible by any conceivable theory to show that a particular act was subsequently done, or how it was done. On their face, they do not purport to be proof of such an act or event.

The statute, Section 1732(a), specifically spells out that the documents admissible under its terms are to be a "memorandum or record" of an act, occurrence or event. The documents here are not a "memorandum or record" of an act, occurrence or event material to this case. The question here is what was physically present on the inside of the "Alabama Plant," not what someone may have ordered to go into that plant.

The Court relies on the decision in *Kamm v. Rees*, 177 Fed. 14, 23 (9th Cir., 1910), to hold that the time at which a document is made may vary either before or after the occurrence of the act or event "recorded." In *Kamm v. Rees*, the drawings and ledger accounts were offered to show a series of acts where each document recorded a contemporaneous one of the acts, namely, to whom did plaintiff extend credit, over a period of time. We find no fault with that decision. It does not support the ruling in this case that a *prior document* can be a memorandum or record of a *subsequent event*.

We respectfully submit that the ruling on Section 1732 (a) is incorrect on the facts in this case, and will cause error in cases far beyond the field of patent law.

Conclusion.

Rehearing and reconsideration of the questions presented should be granted because the rulings of law involved are erroneous on the facts here and set unsound precedents for future litigants.

Respectfully submitted,

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Of Counsel.

Certificate of Counsel.

I hereby certify that I am one of the counsel for the appellant and petitioner, and that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

RICHARD GAUSEWITZ.